7. — *The Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay, to which are Prefixed the Charters of the Province, with Historical and Explanatory Notes and an Appendix.* Published under Chapter 87 of the Resolves of the General Court of the Commonwealth for the Year 1867. Vol. I. Boston: Wright and Potter. 1869. 8vo. pp. xxix, 904.

In the year 1639, nine years after the setting up of the framework of Massachusetts, there was heard a muttering about the insecurity of living under a government not administered according to written and known rules. "The people had long desired a body of laws, and thought their condition very unsafe while so much power rested in the discretion of Magistrates." One would say that this was not unwise, but the wisdom of Winthrop and some of his colleagues concluded otherwise. "Two great reasons there were which caused most of the Magistrates and some of the elders not to be very forward in this matter. One was, want of sufficient experience of the nature and disposition of the people, considered with the condition of the country and other circumstances, which made them conceive that such laws would be fittest for us which should arise *pro re nata* upon occasions, etc. And so the laws of England and other States grew, and therefore the fundamental laws of England are called *customs, consuetudines.* 2. For that it would professedly transgress the limits of our charter, which provides we shall make no laws repugnant to the laws of England; and that we were assured we must do. But to raise up laws by practice and custom had been no transgression; as in our church discipline, and in matters of marriage, to make a law that marriages should not be solemnized by ministers is repugnant to the laws of England, but to bring it to a custom by practice for the Magistrates to perform it, is no law made repugnant, etc." * So the Magistrates, avoiding as far as might be an invidious attitude of opposition, put in action their familiar policy of embarrassment and delay.

John Cotton, from a Committee raised by the General Court "to make a draft of laws agreeable to the Word of God, which might be the fundamentals of this Commonwealth" tried his ready hand at the agitated moment of the Pequot war and the Antinomian controversy and "did present a copy of Moses his judicials, compiled in an exact method." This code was obviously so far from being what was wanted, as to afford an easy opportunity for giving the whole thing the go-by for the time.

After two years more the General Court "ordered that the freemen

* Winthrop, History of New England, Vol. I. pp. 322, 323.

of every town, or some part thereof chosen by the rest, shall assemble together in their several towns, and collect the heads of such necessary and fundamental laws as may be suitable to the times and places where God by his providence hath cast us, and the heads of such laws to deliver in writing to the Governor for the time being," to be "presented to the General Court for confirmation or rejection as the court shall adjudge." * This scheme, too, came to nothing, and others like it.

To make a long story short, the undertaking was baffled till the course of time and events had broken the force of the objections which had lain against it. On the one hand, in the experience of a few years the characteristics of a useful jurisprudence had disclosed themselves, and on the other, the English Parliament was crowding hard upon the King, and in consequence the fear of impending interference from England was dying out in Massachusetts. In 1641 the cautious guides of public action had become disposed to gratify the popular wish for a legal code. The General Court committed the business to the Governor, — Bellingham, a learned lawyer, — and in December of that year the Court, with unanimous consent, "established the hundred laws which were called *The Body of Liberties.*" † This code, the basis of the Statute Law of Massachusetts, and indeed of all New England, was drawn up by Nathaniel Ward, author of the very witty, and once very famous book, the "Simple Cobbler of Agawam." ‡ He was now minister of Ipswich, but had in England been "a student and practicer in the courts of the common law."

The Body of Liberties was, on the one hand, the proper foundation, and, on the other, the beginning of a superstructure, of the full system of legal provisions which was desired. In the fifth year after its adoption, Bellingham and Ward were authorized to prepare a volume of Statutes, which was accordingly published in 1648. The General Court had "found by experience the great benefit that doth redound to the country by putting of the law in print." § There were two more publications of the Statutes in the time of the old charter, namely, in 1658 and in 1672, || in which latter year also Plymouth printed its code.

After the vacating of the colonial charter by a decree of the Lord Chancellor in 1684, came the lawless government of the Council, with Joseph Dudley for its President; then the despotism of Sir Edmund Andros; then the provisional administration, with Bradstreet at its

* Palfrey, History of New England, Vol. II. p. 22, note 3.
† Winthrop, History, Vol. II. p. 55.
‡ Ibid.
§ Palfrey, Vol. II. p. 260.
|| Ibid., p. 394, Vol. III. p. 40.

head; and lastly, the provincial charter of William and Mary in 1692, from which was taken a new departure on the voyage that was to terminate at Lexington and Bunker Hill. Of the Statutes of the Province of Massachusetts, that is, of the laws enacted between the Revolution of 1689 and the Revolution of 1775, eight collections were published, besides the publications of laws of single courts; namely, in 1699, 1714, 1724, 1727, 1742, 1755, 1761, and 1763. There would have been another in 1773, but Governor Hutchinson arrested the action of the General Court to that effect. In 1729 there was also published a volume exhibiting the series of past legislative proceedings bearing on the controversy still pending at that time, about the granting of stated salaries to the governor, lieutenant-governor, and judges.

Five years ago the Legislature of the Commonwealth authorized the appointment by the governor of three or more commissioners "learned in the law and in the history of Massachusetts to prepare for publication a complete copy of the Statutes and Laws of the Province and State of Massachusetts Bay from the time of the Province charter to the adoption of the Constitution of the Commonwealth"; a work which was diligently executed by those eminent lawyers, Ex-Governor Clifford, Mr. Ellis Ames, of Canton, and Mr. Abner C. Goodell, of Salem. This preliminary work being done, the General Court, three years ago, authorized the printing and publication of the series of Provincial Statutes, of which accordingly the first volume is now before us, covering the period between the charter of William and Mary and the death of Anne (1692–1714).

The book has been edited by Mr. Ames and Mr. Goodell, with the skill and diligence promised by the reputation of those distinguished jurists. It contains all the public acts known to have been passed within the period, except four which have not yet been found, but which are known to have related only to grants of pay to the Governor and the county commissioners and to assessments of taxes. It is furnished with a complete apparatus for the facilitating of reference; with an elaborate index of subjects, with a table of names of persons and places, and with lists of the titles of public acts, private acts, joint resolves and orders, and separate resolves of each branch of the legislature. It presents the marginal notes of the old impressions, as a sort of nearly contemporaneous commentary by competent persons, and thus, "nearly of equal authority with the laws themselves." Against each act subsequently referred to in any reported decision of the Supreme Court it inserts a memorandum to that effect; and against each act disallowed by the English government by virtue of a clause in the new charter, the fact, the date, and generally the alleged reasons

of such disallowance are recorded. Finally, the record of the acts of each General Court is followed by notes relating to their history and policy, the objections made against them, whether here or in England, and the manner in which they were affected by later legislation, the materials for these comments being largely drawn from the journals and files of the English Privy Council and of its Committee for Trade and Plantations.

Nothing need be said to show how great is the interest of this work alike for the general student of history and for the professional jurist. To the former it is especially attractive from its relation to that social revolution which was brought about in Massachusetts by the substitution of the provincial charter for the primitive charter of King Charles the First. Our attention is arrested on the opening of the book, where, on the first page, instead of the plain old phrase, redolent of the *corporation* origin, "it is ordered," or "the Court does order," we have an enacting clause in the adopted form, "Be it ordered and enacted by the Governor, Council, and Representatives convened in General Assembly, and it is hereby ordered and enacted by the authority of the same." We are apt to speak in a loose way of the franchise of citizens of the colony of Massachusetts. The fact is, that whoever possessed and used the franchise, whoever voted, in colonial times, did so by virtue of his having been admitted to be a member of the corporation created by King Charles's charter under the style and title of "The Governor and Company of the Massachusetts Bay in New England." That Corporation had, it is true, since 1643, transacted its business by means of a legislative department, consisting of two branches. But only one branch — the Magistrates or Council — had been expressly created by the charter, which provided that it should be elected by the body of freemen, who were also to exercise other powers when assembled in their General Court. The other branch was created by a straining, at all events, — if we will not say by a fiction, — of law. The freemen, having become numerous, and being so scattered among dangerous Indian neighbors that it was inconvenient for them to come often together, said that it was not unreasonable, and would do no harm to anybody, for them to exercise by proxy — that is, by elected agents — some of the powers vested in them by the charter, and other powers made necessary by what had come to be their situation, instead of all travelling down to Boston, and leaving their families unprotected, and their fields unploughed; and hence arose the House of Deputies in its rudimentary state. The later charter given by the elected Dutch King of England knew nothing of any "Governor and Company of the Massachusetts Bay."

Henceforward the dwellers in this country were "our good subjects the inhabitants of our province or territory of the Massachusetts Bay," and the freemen, or voters, were as many of those good subjects as possessed a freehold to the value of forty shillings per annum, or other estate to the value of forty pounds sterling. They could no longer choose a Governor, Lieutenant-Governor, and Secretary, as the freemen of the Corporation had done. The King was henceforward to provide them with these officers. They had no longer an unrestricted choice of a Council. Their Deputies, with the last year's Council, nominated Counsellors from year to year, but the King's Governor might, if he pleased, say that he would have none of them. They could not, by their Representatives, appoint Judges as of old; Judges were to be nominated by the Governor, subject to a negative by the Council. They were not free to legislate by functionaries empowered by themselves. The lower House continued to represent them as of old. But not as of old, any action of the House, to be effective, must now get the favor first of a Council not absolutely of their own making; secondly, of the King's Governor, whose veto was conclusive; and lastly, of the King's Privy Council, who, by virtue of a clause in the new charter, might repeal and annul any law of Massachusetts at any time within three years from its passing.

It is a study to observe the attempts of the local leaders to keep, under the new charter, as much as might be of the liberty and self-government enjoyed under the old. The imported King of England, perhaps not the less because royal prerogative was a new luxury to him, loved prerogative not much less than his unlucky father-in-law, and any Calvinistic enthusiasm on his part which his subjects in New England may have supposed would bring him and them into sympathy, they soon found they had counted on too sanguinely. His first Governor, Sir William Phipps, was well known to the Massachusetts patriots, among whom he was born and lived, as a thick-headed person, and on that knowledge they may have founded some flattering hopes. But the surly and business-burdened king on the one hand, and the dull and well-disposed Governor on the other, were not the only potential parties they had to deal with. The English Board of Trade was jealous by constitution and habit. The crown lawyers, Sawyer and Treby, had been mixed up in the old colonial controversy, and had its story by heart, from title to colophon. The Attorney-General was watching them like a lynx. There were not wanting witty people in Massachusetts in those days, but they needed to be wittier than they were, if they would outwit John Somers. He was in no hurry about setting right their disagreeable legislation. He knew

better than that. They had accepted the new charter with reluctance and misgivings. Many of them had taken it as simply unavoidable, and yielded to it with much indignation and discontent. It was not worth while to contradict and disappoint them while they were in such a sore mood. The influence of time and habit is soothing, and after a little while they would be more tractable and patient, while on the other hand no great advantage would be lost on the King's part by a little delay, and something material would even be gained by having it seen that if he procrastinated he did not forget, and that his long silence was not to be construed as giving consent. So not until nearly the end of the three prescribed years of the King's privilege in respect to legislation in Massachusetts did the disallowances of his Privy Council begin to come over. The first Governor under the new charter arrived in Boston from England, where, with President Mather, he had been treating about it, in May, 1692. The newly constituted legislature came together in the following month. Its first enactment was "that all the local laws respectively ordered and made by the late Governor and Company of the Massachusetts Bay and the late government of New Plymouth, being not repugnant to the laws of England, nor inconsistent with the present constitution and settlement by their Majesties' royal charter, do remain and continue in full force in the respective places for which they were made and used, until the tenth of November next." When November came the provision was indefinitely extended as to time. Both enactments were duly certified to England, and the Province rejoiced in the quiet of its ancient administration, and looked for that completion of three years which would confirm it past recall. But the Privy Council counted the months as attentively as they, and just before the three years were out (August, 1695) it broke its delusive silence. "How is this, gentlemen of the General Assembly of Massachusetts?" said the King's managers; "you legislate compendiously. Have the goodness to inform us with 'express and particular specification' what were 'all the local laws,' established during seventy years, which you have been re-enacting in a single sentence, and we will let you know what the King will do about it. Meanwhile your re-enactment is disallowed, and of no effect, and you must begin again."

So the unjust Navigation Laws of England were extremely hurtful to Massachusetts, and how to escape or relieve their operation in the Province was a standing problem. The government at home was excessively tenacious of them. The Board of Trade had scarcely an eye for anything else. Day by day the Royal Exchange was noisy with stories of their evasion by the cunning traffickers of New England. Decorum and prudence alike required of the newly con-

stituted government of the Province to look to this important matter, and the way they took was, in their first session, to pass an "Act for the erecting of a Naval Office." The object of this law, as set forth in the Preamble, was, "the due and more effectual observation of said Act of Parliament, and that all undue trading, contrary to the said Act, may be prevented in this their Majesties' Province of the Massachusetts Bay," and the method was to appoint nine revenue officers in the Province for so many different ports. The King's Privy Council did not see this adaptation of means to ends in the same light as it was viewed here, and the law was set aside on the ground that the functions assigned by it to collectors of local appointment, were, "by divers Acts of Parliament, reserved to such officer or officers as shall be appointed by the Commissioners of his Majesty's customs." Of the ten acts passed at this session the last related to Harvard College. With the annulling of the charter of the "Governor and Company of Massachusetts Bay," it was held that the corporations that had been created by it — that of the college among the rest — had fallen (*vitulus in matris ventre mortuus*). Dr. Increase Mather, the Governor's pastor, and joint negotiator of the Provincial Charter, got an Act passed creating a governing corporation for the College to consist, in the first instance, of himself as President, and a Treasurer, and eight Fellows (mostly his friends), with perpetual succession by its own election, and dispensed from the former responsibility to a Board of Overseers. The King's advisers had no favor for such independent institutions for the training of the young. "Whereas," they wrote, "no power is reserved to his Majesty to appoint visitors for the better regulating the said College, the said Act hath been repealed, that the General Assembly may renew the same with a power of visitation reserved both to his Majesty and the Governor or Commander-in-Chief of that Province."

The first Act of the next session, consisting of nine sections, was in the nature of a Bill of Rights. It contained the following memorable provision, which, had it become law, would have removed the occasion for the War of Independence: "No tax, tallage, assessment, custom, loan, benevolence, or imposition whatever, shall be laid, assessed, imposed, or levied on any of his Majesty's subjects, or their estates, on any color or pretence whatsoever, but by the act and consent of the Governor, Council, and Representatives of the people, assembled in General Court." But the Privy Council disallowed the Act, assigning as one of two reasons for so doing, that it allowed "bail to be taken in all cases except treason and felony," which "with other privileges proposed by the said Act had not been as yet granted by his Majesty in any of the plantations."

It would take too much space to present even a general view of

the legislation of Massachusetts in that transition period of twenty-two years which is covered by this volume. The incapable administration of the first of King William's governors, and the careless and friendly rule of the other were of short duration. The recreant son of Massachusetts, Joseph Dudley, governor for Queen Anne, opened the game which was not to be played out till ten years after the Stamp Act. Dudley brought urgent instructions to make the Province provide stated salaries for the Governor, Lieutenant-Governor, and Judges. This was a demand to which the Province could say No, if it would, taking of course the responsibility of denial, and the peril of such displeasure on the sovereign's part as it might provoke. By the terms of the charter, it belonged to the "Great and General Court or Assembly" to raise and dispose of money for "the necessary defence and support of the government of the Province." Without its free grant, no money could be had from it. If by establishing stated and permanent salaries it should release from dependence upon it the Governor and Judges (creatures as these were of the King, the one immediately, the other indirectly), those officers would become the uncontrolled instruments of the arbitrary designs of the court. The Province would do nothing of the sort. From that position neither wheedling nor menaces ever moved it. Dudley, energetic and astute and plausible, pressed the claim stubbornly through more than half of his fourteen years administration, but he gained not an inch of ground. Governor Burnet, the genial Bishop's son, tried his deft hand at it, and perhaps the story of the time was true, that his disappointment broke his heart. At all events, however it might be about the impracticable knot's strangling him, he did not loose or cut it. The popular Governor Belcher, grandson of the Cambridge inn-keeper, got on no better, though he had it in charge to say that unless there was a reformation, "his Majesty would find himself under the necessity of laying the undutiful behavior of the Province before the legislature of Great Britain." The Province persisted in its refusal, and the next Governor and his successors desisted from the hopeless movement. The question outlived by several years the time of Queen Anne and Governor Dudley. But the fencing upon it during the early stage is a noticeable feature of this volume.

A smaller but by no means unimportant matter related to the right of appeal by disappointed suitors from the local courts to the King in Council. In the "Act for the establishing of judicatories and courts of justice within this province," passed by Governor Phipps's first General Court, this right was secured to dissatisfied parties "in personal actions not exceeding £300, and no other." The Privy Council set it aside, the limitation "not being according to the words of the charter, and

appeals to the King in Council in real actions seeming thereby to be excluded." The next year Massachusetts tried again to establish the same principle, and with the same ill-success, in the institution of a Chancery Court; and the experiment was repeated, and once more defeated two years later. A law of 1697 "for establishing of Courts" ordained "that all matters and issues of such should be tried by a jury of twelve men." The Privy Council said No, inasmuch as Admiralty Courts knew nothing of juries, and it belonged to the Admiralty Courts, "at the pleasure of the officer or informer," to administer the precious Navigation Laws. An "Act establishing of Seaports within the Province," and designating eight ports of entry and clearances, had to undergo the same ordeal, and was rejected for the reasons that it was a function of the royal commissioners of the customs to designate ports of collection, and "that the establishing of so many ports in such inconsiderable places" would be "a great means to encourage and promote clandestine and illegal trade." The Provincial legislature set about "encouraging a Post-Office," but the movement appeared to the Privy Council "to be prejudicial to the office of the Postmaster-General," whose patent included "the Post-Office in America"; accordingly they were "humbly of opinion that the said Act be repealed," and their humble opinion prevailed. An "Act for the better securing the liberty of the subject" gave a right to the writ of *habeas corpus:* Even the bigoted Tory historian Chalmers says they were wrong in this proceeding, as, if the right needed to be supported by a statute, they ought simply to have assumed it as belonging indefeasibly to every subject of the English realm. But King William's Privy Council took advantage of the false step, and reviving one of the most insolent doctrines of the despotism of Andros, snuffed out the law, because the "privilege" which it bestowed had "not as yet been granted in any of his Majesty's Plantations." Another Act in 1697 "for incorporating Harvard College" gave a power of visitation to the Governor and his Council; but this sharing of the visitatorial power did not come up to the demands of the home government, and the Act was thrown out accordingly. It was one of the last formal Acts which met that fate. As far as we have observed, no Act of a later date than 1698 — that is, no Act of the time of Lord Bellamont, or of Dudley, or of the interval between them, when Stoughton was at the head of the administration — was disallowed by the powers at home. Either they had become less wary or less fastidious, or the Massachusetts people had come better to understand how much they might undertake for their own benefit, with a reasonable prospect of carrying it through.

The operation of the new charter, with its conditions for the franchise and other provisions, led to a relaxation of the ancient religious

severity, and of what remained of the ancient connection of the clergy with the government, — a change which had its indications among others in the establishment of the church in Brattle Street on principles of some novelty, and in the controversies which were beginning to be stirred in and about the college. One is the more surprised to find, as late as 1695, a law abridging the powers of non-communicant members of churches in the choice of their minister. An act passed three years before had recognized the right of all inhabitants of a town to participate in the election of the pastor whom all had to aid in supporting. It was now provided that if a majority of the inhabitants disapproved a choice made by the church-members the church should "call in the help of a council consisting of the elders and messengers of three or five neighboring churches"; and if this council should approve the church's action the election should be held to be complete, and the town must provide for the maintenance of the minister so elected and confirmed.

The tax-bills of the time show the relative wealth of the towns. In 1694 the ten richest towns stood in this respect in the following order; namely, Boston, Ipswich, Salem, Newbury, Charlestown, Dorchester, Watertown, Marblehead, Lynn, Cambridge. Twenty years after this order was but little changed, except by the division of municipal territories, as, for instance, the separation of Lexington from Cambridge, though some towns, as Springfield and Hingham, had been growing into importance. With only two or three exceptions, and that for small amounts, Boston had paid a tax through the whole time not less than four times as great as that of Ipswich, the next richest town.

To undertake to comment on the contents of a thick statute book would be something like attempting to make an abstract of a dictionary. A thoughtful reader of this volume will see reason to apply to many and many a page the remark forced from the unfriendly but able and knowing Chalmers when he compared New England with the colonies of the South. In cases where the legislation of Massachusetts did not cross the higher powers at home, he was clear-sighted and fair enough often to see and praise its wisdom. Writing nearly a century after the enactment of some laws which he named of the early provincial period, he said that they "not only marked the spirit of the people, but were probably the cause of the most lasting consequences," and that "to these salutary regulations much of the populousness and of the commerce of the Massachusetts is owing." The course of nearly another prosperous century has now added its testimony to the wholesomeness and durable efficacy of those primitive regulations, and this, too, in respect to matters more vital than were dreamed of in the philosophy of that juiceless economist.